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May 30, 2019

**VIA ECFS**

Marlene H. Dortch, Secretary  
Office of the Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

RE: Advanced Methods to Target and Eliminate Unlawful Robocalls, CG Docket No. 17-59;  
Call Authentication Trust Anchor, WC Docket No. 17-97.

Dear Ms. Dortch:

This letter is in response to the Federal Communications Commission's ("Commission") Draft Declaratory Ruling that, if adopted, will establish immediate call blocking authority for voice service providers.<sup>1</sup> In the same document, the Commission seeks comment on future protections and remedies for those callers whose communication efforts are erroneously blocked under the SHAKEN/STIR framework, while providing no similar protections for the immediate blocking-by-default regime established in the Declaratory Ruling.<sup>2</sup>

The Credit Union National Association ("CUNA") is the largest trade association in the United States serving America's credit unions and the only national association representing the entire credit union movement. With a network of affiliated state credit union associations, CUNA represents nearly 5,500 federal and state credit unions that serve 115 million members collectively. Credit unions are member-owned, democratically run institutions where members play a significant role in governance. This unique relationship between credit unions and their members fosters the need for communication on a host of fronts, including not only messages

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<sup>1</sup> FCC-CIRC 1906-01, Declaratory Ruling and Third Further Notice of Proposed Rulemaking, CG Docket No. 17-59, WC Docket No. 17-97 ( May 16, 2019) ("Draft Declaratory Ruling").

<sup>2</sup> *Id.* at ¶ 55.

relating to governance and financial education, but also the type of critical alerts and legally-required informational calls that financial institutions routinely provide to their customers.<sup>3</sup>

CUNA has significant concerns that the Draft Declaratory Ruling is inconsistent with the statutory requirements of the Telephone Consumer Protection Act, and that the Commission's failure to establish any protections or remedies for legal calls impacted by the proposed framework only increases the harm to callers with an established business relationship and those that have obtained the prior express consent of the called party. As drafted, the Commission's proposed blocking-by-default framework will inevitably lead to the blocking and mislabeling of multiple legally permissible calls, including automated calls. It would thus deprive credit union members of important, desired, and, sometimes, legally required communications from their financial institution. Moreover, the Draft Declaratory Ruling proposes no mechanism for either consumers or legitimate callers to learn that calls have been blocked and fails to establish any process for callers to quickly and efficiently unblock legitimate calls. Accordingly, CUNA urges the Commission to revise the Draft Declaratory Ruling, as proposed below, to require voice providers to implement protections for legal automated calls prior to offering blocking by default.

### **The Draft Declaratory Ruling Unlawfully Authorizes Voice Providers to Block Legal Calls**

The Commission has no statutory authority to authorize voice providers to block legal calls. Commission precedent is to the contrary.<sup>4</sup> The Draft Declaratory Ruling claims that it is merely clarifying the method by which consumers may exercise their choice of which calls to block, which neither the Communications Act nor Commission rules preclude.<sup>5</sup> In fact, however, the Draft Declaratory Ruling authorizes voice providers to develop and implement blocking programs and offer those programs to their subscribers on an opt-out basis.<sup>6</sup> The Draft Declaratory Ruling makes clear that it is banking on consumer inaction or "inertia" to "significantly increase" participation in the voice providers' call blocking initiatives, which are driven by "reasonable analytics" that the existing record demonstrates already leads to substantial blocking or mislabeling of legitimate calls.<sup>7</sup>

Contrary to the glaring absence of authority to block legal calls, Congress has established a specific framework in the Telephone Consumer Protection Act ("TCPA") to identify the types of calls that the Commission may lawfully preclude. Unlike the colloquial term "robocall" that

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<sup>3</sup> *In the Matter of Credit Union National Association Petition for Declaratory Ruling and Rules and Regulations Implementing the Telephone Consumer Protection Act*, CG Docket No. 02-278, Petition for Declaratory Ruling (filed September 29, 2017) ("CUNA Petition").

<sup>4</sup> *See, e.g., Advanced Methods to Target and Eliminate Unlawful Robocalls*, Report and Order and Further Notice of Proposal Rulemaking, 32 FCC Rcd 9706, ¶ 8 (2017) (citing Commission orders); *Establishing Just and Reasonable Rates for Local Exchange Carriers – Call Blocking by Carriers*, Declaratory Ruling and Order, 22 FCC Rcd 11629, ¶ 6 (2007) ("Call Blocking Order") ("Commission precedent provides that no carriers . . . may block, choke, reduce or restrict traffic in any way."). The Draft Declaratory Ruling cites a footnote to paragraph 6 of the Call Blocking Order stating that the blocking bar discussed there "has no effect on the right of individual end users to choose to block incoming calls from unwanted callers." Draft Declaratory Ruling ¶ 22. That footnote provides no basis to assume that Congress authorized carriers to block lawful calls based on inaction by a consumer.

<sup>5</sup> Draft Declaratory Ruling ¶ 30.

<sup>6</sup> *Id.* ¶ 32 (A voice provider must inform its customers "how *it* chooses to block certain calls.") (emphasis added).

<sup>7</sup> *See* footnote 25 below.

has become a general term that people use for any kind of annoying, unwanted or illegal call, the TCPA and the Commission's implementing regulations include specific legal definitions of prohibited automated communications. These definitions generally preclude prerecorded or artificial voice calls to residential telephone lines and automated or prerecorded or artificial voice calls to cell phones.<sup>8</sup> The TCPA and the Commission's regulations also expressly exclude the following two general categories of calls from these prohibitions:

- (1) calls made to a residential landline from a caller with prior express consent or with an existing business relationship for informational purposes;<sup>9</sup> and
- (2) automated calls made to a cell phone with the prior express consent of the called party.<sup>10</sup>

Consistent with the statute's requirements and the Commission's corresponding regulations, credit unions have invested significant resources adopting and implementing compliance protocols to ensure that their automated telephonic communications with members fit within the TCPA's classification of legal calls. Those efforts have included the development of written agreements to establish prior express consent, documentation of the type of phone number (wireline or wireless) provided by the consumer to ensure that calls are fully compliant with the law, and mechanisms for identifying when a consumer revokes consent to telephonic communication.

The Draft Declaratory Ruling effectively nullifies these efforts because it proposes a regime that is just as likely to block calls deemed lawful by the TCPA as calls that violate its provisions. The Draft Declaratory Ruling makes no distinction between legal and illegal calls, suggesting at times that opt-out call blocking and opt-in, white-list call blocking should be used by voice service providers to eradicate all "unwanted calls." It expressly provides that "voice service providers may offer opt-out call blocking programs based on any reasonable analytics designed to identify *unwanted* calls."<sup>11</sup> The "reasonable analytics" identified in the draft, however, are incapable of distinguishing between illegal or legal calls, or wanted versus unwanted calls for that matter. They rely on brute algorithms based on indicia such as "large bursts of calls in a short timeframe; low average call duration; low call completion ratios; ... [or] common Caller ID Name (CNAM) values across voice service providers."<sup>12</sup> Yet, each of these characteristics can apply to automated calls without regard to whether those calls are legal or illegal under the TCPA. As a result, the Commission's proposed actions will likely reduce the scourge of illegal automated calls at the expense of also preventing legitimate, legally authorized business calls under the TCPA. Nowhere in the TCPA is there any indication Congress intended to allow the Commission to authorize voice providers to block calls deemed lawful under the statute. To the contrary, Congress expressly directed the Commission to refrain from interfering with the ability of legitimate callers to communicate with their customers.<sup>13</sup>

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<sup>8</sup> See 47 U.S.C. § 227(b)(1)(B); 227(b)(1)(A)(iii).

<sup>9</sup> See 47 U.S.C. § 227(b)(1)(B), 47 C.F.R. § 64.1200(A)(3)(iii) (excluding calls "made for a commercial purpose but does not include or introduce an advertisement or constitute telemarketing.").

<sup>10</sup> See 47 U.S.C. § 227(b)(1)(A)(iii). Emergency calls are also excluded. *Id.*

<sup>11</sup> Draft Declaratory Ruling ¶33(emphasis added).

<sup>12</sup> *Id.* ¶ 34.

<sup>13</sup> H.R. Rep. No. 102-317, at 17 (1991) (The TCPA is not intended to "be a barrier to the normal, expected or desired communications between businesses and their customers.")

In the past, the Commission has focused its call blocking orders and notices on minimizing illegal calls. CUNA strongly supports those efforts and believes that both legitimate businesses and consumers benefit from the elimination of scam, fraud, and unwanted telemarketing calls. But the Draft Declaratory Ruling's proposal to use opt-out call blocking to eliminate all "unwanted" automated calls, without regard to their legality or illegality, is overly broad, inconsistent with the TCPA, and will likely prevent legal calls that—while perhaps unwanted—convey critically important information that, at times, other regulatory agencies require financial institutions to make. Congress has spoken directly on this issue and its intent to establish the aforementioned categories of legal, automated calls is unambiguous.<sup>14</sup> CUNA and our credit union members are seriously concerned that the Commission's proposed Draft Declaratory Ruling, as written, directly contravenes Congress's unambiguously expressed intent.

The Draft Declaratory Ruling is also arbitrary and capricious and procedurally improper. It launches a blocking-by-default regime without having any empirical basis to assess its impact on legitimate calls. An agency's actions are arbitrary and capricious when they fail to "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"<sup>15</sup> Although the Draft Declaratory Ruling cites to certain statistics that it purports show the extent of "robocalling,"<sup>16</sup> it lacks any "facts" or "relevant data" regarding the extent of false positives, nor any assessment of the proposed blocking regime's effect on legitimate calls. Moreover, it is arbitrary and capricious for an agency to "entirely fail to consider an important aspect of the problem."<sup>17</sup> There is no question that the potential for erroneous blocking is an "important aspect" of any call blocking regime, as the Commission itself has repeatedly recognized.<sup>18</sup> Yet the Draft Declaratory Ruling "entirely fail[s]" to address the issue.

The Draft Declaratory Ruling is also procedurally improper. The Commission provided no notice that it intended to reverse its prior determination that voice providers must offer blocking programs on an opt-in basis, especially without at the same time addressing the existing open record in this docket on whether to adopt a challenge mechanism to unblock erroneously blocked calls.<sup>19</sup> The stated rationale for proceeding with a Declaratory Ruling is also suspect. The Draft Declaratory Ruling relies on the Commission's authority to issue a declaratory ruling on its own motion in order "resolve uncertainty."<sup>20</sup> It claims, without any citation to the record, that its determination in the 2015 TCPA Order that consumers must use an "informed opt-in process" has "muddied the legal waters."<sup>21</sup> There are no muddied waters. Voice providers

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<sup>14</sup> When the statute is unambiguous, we look no further and "give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

<sup>15</sup> *Motor Vehicles Mfs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

<sup>16</sup> Draft Declaratory Ruling ¶ 38.

<sup>17</sup> 463 U.S. at 43.

<sup>18</sup> See *Advanced Methods to Target and Eliminate Unlawful Robocalls*, Report and Order and Further Notice of Proposed Rulemaking, 32 FCC Rcd 9706, 9724, ¶ 54 (noting a challenge mechanism may be needed); *id.* at ¶¶ 57-58 (seeking comment on challenge mechanisms); Consumer and Governmental Affairs Bureau Seeks to Refresh the Record on Advanced Methods to Target and Eliminate Unlawful Robocalls, CG Docket No. 17-59, DA 18-842 at 3-4 (Aug. 10, 2018) (seeking further comment on measures to reduce false positives).

<sup>19</sup> *Id.*

<sup>20</sup> Draft Declaratory Ruling ¶ 25 (citing to 47 C.F.R. § 1.2).

<sup>21</sup> *Id.* ¶ 24.

clearly know that if they want to offer blocking tools to their subscribers they must use an opt-in mechanism. The Draft Declaratory Ruling cites to two comments that request that the Commission change its rule that an opt-in mechanism must be used in light of the inadequate participation rates.<sup>22</sup> But a request for a rule change does not indicate there has been any uncertainty regarding legal requirements.

### **It Is Imperative That Voice Providers Implement a Challenge Mechanism Before Offering Blocking Programs by Default**

By authorizing blocking-by-default, rather than requiring consumers to affirmatively opt-in, the Draft Declaratory Ruling will “significantly increase” the level of blocking.<sup>23</sup> One data point provided in the draft suggests that use of blocking tools could increase from around 20 percent of consumers to 95 percent of consumers as a result of the inertial effects of opt-out regimes.<sup>24</sup> In other words, the Commission relies on the substantial likelihood of consumer inaction to establish levels of blocking potentially orders of magnitude greater than currently authorized. That, in any event, is the Commission’s desired effect. In such a regime, most consumers are unlikely to read or appreciate whatever warnings regarding the risk of blocking calls the voice provider disseminates and there is nothing in the Draft Declaratory Ruling that requires voice providers to inform consumers of what calls have been blocked after the fact. The potential for consumer harm is evident.

There is no question that the Draft Declaratory Ruling, if adopted in its current form, will result in a substantial number of erroneously blocked or mislabeled calls. In fact, the current record provides ample evidence that the relatively minimal amount of automated call blocking occurring today already results in legitimate calls being blocked or mislabeled.<sup>25</sup> Some have

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<sup>22</sup> *Id.* ¶¶ 28-29 (citing Comments of American Cable Association, CG Docket 17-59 at 3 (filed Sept. 24, 2018) and Reply Comments of Consumers Union et al., CG Docket 17-59 at 5 (filed Oct. 8, 2018)).

<sup>23</sup> *Id.* ¶ 27.

<sup>24</sup> *Id.* ¶¶ 27-28 (noting Hiya’s comments that “95% of consumers choose to remain on its opt-out call blocking program whereas only 20% choose to join its opt-in call blocking program”). *See also*, Letter from Brian Ford, NTCA- The Rural Broadband Association, to Marlene H. Dortch, FCC, CG Docket No. 17-59, WC Docket No. 17-97 at 2 (filed May 23, 2019) (blocking-by-default based on analytics “is a monumental step in broadening what providers can block.”)

<sup>25</sup> Reply Comments of ACA International, CG Docket No. 17-59 at 4 (filed October 8, 2018) (Noting a recent ACA study indicating that 62% of its members report a decrease in right party contact and a 40% decline in call/contact ratios compared to prior years and 78% of members surveyed reported calls being blocked); Comments of the American Bankers Association, CG Docket No. 17-59 at 3-4 (filed September 24, 2018) (“ABA Comments”) (describing extent of mislabeling lawful calls as spam or other derogatory label); Letter from Michele A. Shuster, Counsel for Professional Association for Customer Engagement, to Marlene H. Dortch, FCC, CG Docket Nos. 02-278, 18-152, 17-59 at 2 (filed November 29, 2018) (describing instances where alerts regarding wire transfers, fraud alerts and flight delays were mislabeled as “SCAM LIKELY”); Letter from Rebekah Johnson, Numeracle, Inc., to Marlene H. Dortch, FCC, CG Docket No. 17-59, WC Docket No. 17-97 (filed May 24, 2019) (demonstrating that identical lawful calls were labeled dramatically differently based on analytics, from no risk to high risk.); Reply Comments of Neustar Inc., CG Docket No. 17-59 at 3 (filed October 9, 2018) (reporting that Neustar had conducted “over a hundred analyses” of legitimate calls and discovered that a “significant percentage” of high volume legitimate business calls “were overlaid with some version of ‘spam’ labeling by current analytics companies.”); Comments of INCOMPAS, CG Docket No. 17-59 at 3 (filed January 23, 2018) (“INCOMPAS Comments”) (noting that Microsoft has 1.2 million SkypeOut calls inadvertently blocked); Comments of Sirius XM Radio Inc., CG Docket No. 17-59 at 2 (filed January 23, 2018) (“A significant number of Sirius XM’s entirely legal calls are currently being illegally blocked.”); Comments of PRA Group, Inc., CG Docket No. 17-59 at 1-2 (filed September

suggested erroneous blocking is more likely to occur with “consumer opt-in [now to be opt-out] blocking and labeling services.”<sup>26</sup> Blocking legitimate calls will also increase, engendering substantial risk to public health and safety, undermining the interconnected nature of our nation’s communications networks, and threatening the economic welfare of countless American businesses and consumers.<sup>27</sup> In light of the adverse effects of “false positives,” there is near universal support in the existing record for the implementation of a challenge mechanism to enable callers to unblock erroneously blocked calls. Support for a challenge process includes carriers,<sup>28</sup> blocking application providers and analytics companies,<sup>29</sup> call originators,<sup>30</sup> consumers,<sup>31</sup> and the Federal Trade Commission.<sup>32</sup> The Commission has previously “encouraged voice service providers that block calls to establish a means for a caller whose calls

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24, 2018) (“a meaningful volume of PRA’s live voice calls have become ensnared in overbroad carrier call blocking and mislabeling practices.”)

<sup>26</sup> Reply Comments of CTIA, CG Docket No. 17-59 at 8 (filed October 9, 2018).

<sup>27</sup> Reply Comments of NTCA-The Rural Broadband Association, CG Docket No. 17-59 at 2 (filed October 8, 2018) (“NTCA Reply Comments”) (“Erroneous call blocking could undermine the integrity and interconnected nature of communications networks and prove disastrous to the well-being and safety of consumers and to economic welfare of businesses across the nation.”); Letter from Paula Boyd, Microsoft, to Marlene H. Dortch, FCC, CG Docket No. 17-59, WC Docket Nos. 11-10, 17-97, GN Docket No. 18-238 at 2 (filed May 20, 2019) (permitting call blocking on an opt out basis “would likely result in legitimate calls be blocked inadvertently, including calls that are important to the well-being of consumers”).

<sup>28</sup> See, e. g., Reply Comments of NCTA- The Internet and Television Association, CG Docket No. 17-59 at 3 (filed October 9, 2018) (“the cable industry supports the Commission’s view that erroneously blocked calls should be ‘unblocked as quickly as possible and without undue harm to callers and consumers.’”) (quoting *Call Blocking Order and Further Notice*, 32 FCC Rcd at 9726, ¶ 57); NTCA Reply Comments at 3-4 (“the Commission should require that every provider utilizing call blocking tools adopt a robust, clearly articulated resolution process” that is “quick, simple and straightforward for the calling party.”); Comments of ITTA –The Voice of America’s Broadband Providers, CG Docket No. 17-59 at 4 (filed September 24, 2018) (expressing support for timelines and certain white lists to address erroneous call blocking); INCOMPAS Comments at 3-4 (urging the Commission to adopt a readily discoverable challenge mechanism). See also Comments of AT&T, CG Docket No. 17-59 at 9-10, 12-13 (filed September 24, 2018) (stating the Commission should require service providers to document procedures by which blocks are removed and have “a process in place to unblock legitimate calls in the event of any inadvertent blocking of such calls”).

<sup>29</sup> Letter from Patricia J. Paoletta, Counsel for First Orion, to Marlene H. Dortch, FCC, CG Docket No. 17-59 at 2 (filed May 1, 2019) (emphasizing importance of carriers and provider partners “hav[ing] in place processes to quickly unblock or un-label a number that is determined to be a lawful call.”); Comments of Transaction Network Services, CG Docket No. 17-59 at 6 (filed September 24, 2018) (noting that false positives will arise and stating that it offers a “robust dispute resolution process.”); Comments of Hiya, CG Docket 17-59 at 1-3 (filed January 23, 2018) (noting that “a challenge mechanism” is integral to a healthy call protection system and that providers should provide notification of blocking, for example, by carriers providing an blocking error code.)

<sup>30</sup> See, e.g., Comments of ACA International, CG Docket No. 17-59 at 9-10 (filed January 23, 2018); ABA Comments at 5-6; Comments of the Electronic Transactions Association, CG Docket No. 17-59 at 2 (filed January 23, 2018); Comments of the Retail Energy Supply Association, CG Docket No. 17-59 at 3-4 (filed January 23, 2018); Comments of the Encore Capital Group, CG Docket No. 17-59 at 2-3 (filed January 22, 2018); Comments of Professional Association for Customer Engagement, CG Docket No. 17-59 at 4-5 (filed January 23, 2018).

<sup>31</sup> Letter from John Bergmayer, Senior Counsel for Public Knowledge, to Marlene H. Dortch, FCC, CG Docket No. 17-59, EC Docket No. 17-97 (filed May 29, 2019) (“there should be a clear mechanism to address instances of carriers blocking calls by mistake.”)

<sup>32</sup> Comments of the Federal Trade Commission, CG Docket No. 17-59 at 9 (filed July 3, 2017) (“The FTC supports requiring providers to develop clear and specific procedures to address complaints from individuals and businesses whose calls are inadvertently blocked.”)

are blocked in error to contact the voice provider in order to remedy the problem.”<sup>33</sup> Despite the Commission’s encouragement, industry efforts to implement challenge mechanisms have proven largely unfruitful.<sup>34</sup> The Commission must take a more direct role by declaring that in order for opt-out call blocking generally to be a just and reasonable practice,<sup>35</sup> the voice provider must have in place a mechanism to enable callers to quickly and efficiently unblock erroneously blocked calls. The inclusion of a challenge mechanism requirement would help ameliorate some of the legal concerns described above.

CUNA understands the concerns of voice providers that the Commission not mandate the details of a challenge mechanism. Nevertheless, those concerns should not and, in fact, cannot trump Congress’s intent to preserve automated calls deemed lawful under the TCPA. Thus, it is imperative that, should the Commission adopt the Draft Declaratory Ruling, the Commission require voice providers to have a challenge mechanism in place before offering blocking by default. CUNA thus proffers the following language for inclusion in the Draft Declaratory Ruling at paragraph 30:

Accordingly, we clarify that voice providers may offer consumers call blocking through an opt-out process. Or to use the language of the Act, we find that opt-out call blocking programs are generally just and reasonable practices (not unjust and unreasonable practices) and enhancements of service (not impairments of service) **as long as the voice provider has in place a mechanism by which callers may unblock erroneously blocked calls. We leave to providers to develop the specific details of such a mechanism, but it must include the following features:**

- (1) Callers must be notified that their calls are being blocked and which provider is responsible for the blocking. The challenge mechanism must, therefore, incorporate some notification mechanism, such as an intercept message, that informs the caller in real time or near real time that its calls to identified calling party numbers are being blocked and that identifies the entity doing the blocking;**
- (2) The mechanism must include readily ascertainable contact information by which a caller can submit to the voice provider a request to trigger the process to lift the erroneous block; and**
- (3) The voice service provider should commit to a prompt, but reasonable timeframe for resolving the claim of erroneous blocking.**

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<sup>33</sup> Draft Declaratory Ruling ¶ 16 (citing *Call Blocking Report and Order and Further Notice*, 32 FCC Rcd at 9724-25, paras. 54-55).

<sup>34</sup> Reply Comments of Sirius XM Radio Inc., CG Docket No. 17-59 at 3, 6-7 (filed October 9, 2018).

<sup>35</sup> Draft Declaratory Ruling ¶ 30.

## **Failure to Adopt a Challenge Mechanism in the Declaratory Ruling Conflicts With More Recent Indications of Congressional Intent to Ensure that Legitimate Calls Are Not Blocked**

The Senate Report accompanying that chamber's recent, overwhelming adoption of the Telephone Robocall Abuse Criminal Enforcement and Deterrence Act (the TRACED Act)<sup>36</sup> recognizes that "not all robocalls are illegal or unwanted" and that when made by "legitimate companies" "valid robocalls can benefit consumers."<sup>37</sup> As the Senate Report notes, "[m]any important services are carried out via robocalls when institutions and call recipients have established a prior relationship." Some of these messages "can have life or death consequences for the intended recipient."<sup>38</sup>

Given these concerns, the Senate Report directs the Commission, when establishing rules for when a voice provider may block calls, to consider not just the benefits to consumers, but also "the burden on callers and consumers in allowing voice service providers to block calls without providing prior or contemporary notice to the caller and an opportunity for the caller to rebut a blocking determination."<sup>39</sup> It also directs the Commission to require voice providers to "unblock improperly blocked calls in as timely and efficient a manner as reasonable" and to consult with call originators.<sup>40</sup> These directives evidence a clear Congressional concern regarding the blocking of legitimate and often critical messages and the need for the Commission to address that concern with an appropriate challenge mechanism.

The Draft Declaratory Ruling utterly fails to address these concerns, or even acknowledge the implications of its proposed actions on legitimate callers. By enabling blocking by default without any mechanism to redress false positives, the Draft Declaratory Ruling conflicts with the statutory intent of Congress as evidenced by the TCPA, but also recent bipartisan legislative efforts by Congress to combat fraudulent calling while also protecting legitimate calls.

## **As Written, The Proposed Declaratory Ruling Conflicts With The Legal Obligations Imposed On Financial Institutions By Other Federal Agencies**

Call blocking by default also threatens to undermine the consumer contact requirements established by other federal agencies responsible for regulating financial institutions. The Consumer Financial Protection Bureau's ("CFPB") early intervention rule, for example, requires mortgage loan servicers to make live contact with a delinquent borrower within 36 days of a delinquency and periodically thereafter as long as the loan remains delinquent.<sup>41</sup> The lender must inform the borrower of loss mitigation options.<sup>42</sup> The consumer is surely advantaged by receiving such communications. Additionally, the Department of Education imposes calling

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<sup>36</sup> TRACED Act, S. 151, 116<sup>th</sup> Cong. (2019). The Senate adopted the Act 97 to 1. 165 Cong. Rec. S.151, S3073-3075.

<sup>37</sup> S. REP. NO. 116-41, at 2 (2019).

<sup>38</sup> *Id.* at 2-3.

<sup>39</sup> *Id.* at 15.

<sup>40</sup> *Id.* at 15.

<sup>41</sup> 12 C.F.R. § 1024.39.

<sup>42</sup> *Id.*



requirements on student loan servicers. For example, it requires servicers to make at least four calls in a 21-day period to certain income-driven repayment plan applicants and it expects servicers to reach out immediately once a problem arises.<sup>43</sup>

The CFPB more generally has recently issued a notice of proposed rulemaking to update the Federal Debt Collection Practices Act to take into account modern communications mediums.<sup>44</sup> Recognizing that communications regarding debt “may benefit a consumer by helping the consumer to either resolve a debt the consumer owes, or identify and inform the debt collector if the debt is one the consumer does not owe,” the agency proposes call frequency and other rules to balance consumer and lender interests.<sup>45</sup> One of its proposals would permit third-party debt collectors to make no more than seven calls within a seven day period or within seven days after engaging in a telephone conversation with the person.<sup>46</sup> The CFPB would also clarify the times and places for debt-related communications and provide other consumer protections while some degree of certainty around calling practices.<sup>47</sup> The Draft Declaratory Ruling would undermine the agency’s efforts to ensure effective and reasonable communications between lenders and borrowers in the absence of a mechanism to ensure such calls are not blocked.

### **Blocking by Default Threatens to Further Undermine the Ability of Credit Unions to Contact Their Members**

Absent a robust challenge mechanism, blocking-by-default will exacerbate the difficulties credit unions already face in contacting their members due to the uncertainty and costs created by the Telephone Consumer Protection Act (“TCPA”). The threat of TCPA litigation is already having a well-documented chilling effect on legitimate businesses seeking to communicate with their customers and is causing credit unions to forgo the use of efficient communications technologies. The American Airlines Federal Credit Union recently quantified some of the costs both in terms of company resources and costs to its members who are less likely to receive timely late-payment notifications.<sup>48</sup> If the Commission moves forward with blocking-by-default, it should also move forward with TCPA reforms. CUNA, for example, has a petition pending that would provide an established business relationship exception for wireless informational calls similar to the existing exception for resident landline calls.<sup>49</sup> Creating such an established business relationship exemption would be consistent with the view described above in the Senate Report accompanying the TRACED Act, which highlighted the benefits of calls where such a relationship exists.

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<sup>43</sup> *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Petition for Reconsideration of Great Lakes Higher Education Corp.; Navient Corp.; Nelnet, Inc.; Pennsylvania Higher Education Assistance Agency; And The Student Loan Servicing Alliance*, CG Docket No. 02-278, Petition for Reconsideration, at 7-8 (filed December 16, 2016).

<sup>44</sup> Bureau of Consumer Financial Affairs, Debt Collection Practices (Regulation F), 84 Fed. Reg. 23274 (May 21, 2019).

<sup>45</sup> *Id.* at 23275.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> Letter from Gail Enda, American Airlines Federal Credit Union, to Marlene H. Dortch, FCC, CG Docket Nos. 02-278, 18-152 (filed May 17, 2019).

<sup>49</sup> *In the Matter of Credit Union National Association Petition for Declaratory Ruling and Rules and Regulations Implementing the Telephone Consumer Protection Act*, CG Docket No. 02-278, Petition for Declaratory Ruling (filed September 29, 2017) (“CUNA Petition”).

Blocking by default also undermines the concept of consent, the basis of the TCPA framework. Consumers will often provide consent to be called in lending documents or contracts. Where this consent is an aspect of the bargain, courts have barred unilateral revocation.<sup>50</sup> Call blocking may become a *de facto* method of unilateral revocation, either inadvertently or deliberately. Call blocking by default could lead to inadvertent revocation because the algorithms used to identify illegal or unwanted calls have no ability to assess whether consent has been provided by any particular called party. Consumers that opt-in to white list programs, such as limiting calls to numbers in their contact lists, may not be mindful that their list does not include a company's number. Even if it does, there is no guarantee that the number in the contact list will be the same as the one used to make a particular call. Consumers may also simply decide that a particular company's calls are unwanted and use blocking tools to avoid them, notwithstanding that they may have provided consent. This is yet another way the Draft Declaratory Ruling is inconsistent with and undermines the TCPA.

The Draft Declaratory Ruling provides no means by which companies are notified of these forms of *de facto* revocation, contrary to the Commission's rules that require notice of revocation by reasonable means. In short, the Draft Declaratory Order raises serious issues regarding the tension between consumer choice regarding calling and consumer consent to be called. A challenge mechanism that informs companies that their calls are being blocked would provide at least some means to ameliorate this concern.

## CONCLUSION

CUNA respectfully urges the Commission to seek comment from interested stakeholders before adopting a blocking-by-default regime or, in the alternative should it move ahead, require voice providers to have in place a method to unblock erroneously blocked calls before offering blocking on an opt-out basis. In addition, CUNA urges the Commission to finally address the significant concerns that multiple parties have raised regarding the prolonged ambiguity surrounding the definition of an autodialer under the TCPA and to finally seek to put in place regulations modernizing the TCPA to reflect current technological trends and consumer behavior. All of these issues should be part of a comprehensive, well thought out approach to ensuring that, when it comes to robocalls, the interests of both consumers and legitimate businesses remain protected under the law.

Sincerely,

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<sup>50</sup> See, e.g., *Reyes v. Lincoln Auto Fin. Services*, 861 F.3d 51